Ketua Pengarah Kastam, Jabatan Kastam Diraja Malaysia v Jimah East Power Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(A)-601–11 OF 2020
AZIZAH NAWAWI, RAVINTHRAN AND NANTHA BALAN JJCA
28 FEBRUARY 2024

Customs and Excise — Goods and Services Tax ('GST') — Exceptional Input Tax claim — Taxable person under GST Act 2014 claimed for refund of exceptional input tax incurred for constructing electricity power plant — Director-General of Customs ('DG') rejected claim on ground claim was not related to any 'taxable supplies' claimant had made as power plant only became operational after GST Act was abolished — Whether abolishment of GST Act rendered input tax claim ineffectual — Whether claim for exceptional input tax must be related to taxable supplies made or to be made by taxable person

The respondent, which operated an electricity power plant, had in July 2014 entered into an agreement to sell electricity to Tenaga Nasional Bhd for a period of 25 years. The power plant only became operational on 10 December 2018 when it began supplying electricity to the National Grid. Following the respondent's successful application to the appellant ('the DG') to be registered under the Goods and Services Tax Act 2014 ('the GST Act'), the respondent, for its first taxable period from 1 August 2016 until 31 August 2018, claimed for the refund of an exceptional input tax ('exceptional ITC') amount of RM45,873,669.66 it had incurred in constructing the power plant. An exceptional ITC fell under reg 46 of the Goods and Services Tax Regulations 2014 ('the GST Regulations') wherein, inter alia, the claimant could seek refund of GST paid on goods that were supplied to the claimant before he was registered or required to be registered under the GST Act for the purpose of a business which was carried on or was to be carried on by him at the time of such supply. Regulation 46(1) provided that subject to sub-reg (2), the DG could authorise a taxable person to treat such tax paid as aforesaid as an input tax. Save for allowing RM2,231.21 out of the said RM45,873,669.66, the DG rejected the remainder of the claim on the ground that it did not relate to any 'taxable supplies' the respondent had made. Relying upon ss 2, 38 and 39 of the GST Act and reg 39 of the GST Regulations, the DG took the view that there were no 'taxable supplies' as the power plant only became operational after the GST Act had been abolished with effect from 1 September 2018. The respondent filed a judicial review application to quash the DG's decision. In allowing the application, the High Court held that: (a) reg 46 of the GST Regulations was an independent provision unaffected by ss 38 and 39 of the GST Act; (b) since reg 46 made no mention of 'taxable supplies', it was wrong

of the DG to impose it as a requirement when deciding the exceptional ITC claim; (c) the repeal of the GST Act did not in itself render the respondent's claim ineffectual; and (d) the DG's decision to allow a small portion of the exceptional ITC claim and reject the larger balance was inconsistent and unreasonable to the extent of *Wednesbury* unreasonableness.

Held, unanimously allowing the appeal and setting aside the High Court's decision:

(1) The High Court judge ('HCJ') erred in law in her interpretation of the provisions of the GST Act and the GST Regulations warranting appellate intervention (see para 44).

(2) A claim for input tax under reg 46(1) of the GST Regulations was an exceptional one because GST incurred by a person on the supply of goods to him before his registration as a 'taxable person' was not an input tax and was not claimable unless and until the DG had exercised his discretion under reg 46(1) to authorise that person to treat the tax paid as an input tax. Nothing in reg 46(1) allowed the respondent to claim the exceptional ITC as of right (see paras 27–30).

(3) The HCJ was plainly wrong when she held that it was sufficient if the respondent had complied with all the provisions in reg 46 of the GST Regulations and that reg 46 was not subject to ss 38 and 39 of the GST Act (see paras 31–32).

(4) The respondent was a 'taxable person' under the GST Act only from 1 August 2016 until 31 August 2018 on which latter date the GST Act came to an end. The respondent's power plant only became operational on 10 December 2018 when it began supplying electricity to the National Grid. The GST borne by the respondent on the construction costs of the power plant could not be considered as input tax and could not be credited as there was no direct connection to any taxable supply made or to be made from the plant throughout the respondent's tenure as a taxable person under the GST legislation. Under s 39 of the GST Act, the input tax claim must be connected to taxable supplies. When the GST Act was abolished, any applies made by the respondent after 1 September 2018 could no longer be considered as taxable supplies but merely as regular supplies. In the premises, the DG was not authorised under the GST Act to allow the respondent to treat the sum of RM45,873,669.66 as input tax under reg 46(1) because that amount was not attributable to any taxable supply made by the respondent and therefore could not be treated as input tax (see paras 35–41).

(5) With regard to the GST borne on furniture and fittings, the court agreed with the DG that the same could be considered as an input tax in part because the respondent had used these items to make other taxable

supplies from August 2016 to August 2018. Therefore, the respondent's claim for the sum of RM2,231.20 for the input tax on furniture and fittings was allowed (see para 43).

[Bahasa Malaysia summary

Responden, yang mengendalikan loji janakuasa elektrik pada Julai 2014 telah memasuki perjanjian untuk menjual tenaga elektrik kepada Tenaga Nasional Bhd untuk tempoh 25 tahun. Loji janakuasa itu hanya mula beroperasi pada 10 Disember 2018 apabila ia mula membekalkan elektrik ke Grid Nasional. Berikutan kelulusan permohonan responden kepada perayu ('KP') untuk didaftarkan di bawah Akta Cukai Barang dan Perkhidmatan 2014 ('Akta GST'), responden, untuk tempoh pencukaian pertamanya dari 1 Ogos 2016 hingga 31 Ogos 2018, menuntut bayaran balik tuntutan luar biasa bagi cukai input ('exceptional ITC') sebanyak RM45,873,669.66 yang telah ditanggung dalam pembinaan loji janakuasa itu. Tuntutan luar biasa bagi cukai input jatuh di bawah peraturan 46 Peraturan Cukai Barang dan Perkhidmatan 2014 ('Peraturan GST') di mana, antara lain, pihak yang menuntut boleh mendapatkan bayaran balik GST yang dibayar ke atas barangan yang dibekalkan kepada pihak yang menuntut sebelum dia didaftarkan atau perlu didaftarkan di bawah Akta GST bagi tujuan perniagaan yang dijalankan atau akan dijalankan olehnya pada masa pembekalan tersebut. Peraturan 46(1) memperuntukkan bahawa tertakluk kepada sub-peraturan (2), KP boleh memberi kuasa kepada orang kena cukai untuk menganggap cukai yang dibayar seperti yang disebut di atas sebagai cukai input. Selain membenarkan RM2,231.21 daripada RM45,873,669.66 tersebut, KP menolak baki tuntutan atas alasan ia tidak berkaitan dengan sebarang 'bekalan bercukai' yang telah dibuat oleh responden. Dengan bergantung kepada ss 2, 38 dan 39 Akta GST dan peraturan 39 Peraturan GST, KP berpandangan bahawa tiada 'bekalan bercukai' kerana loji janakuasa itu hanya mula beroperasi selepas Akta GST telah dimansuhkan berkuat kuasa dari 1 September 2018. Responden memfailkan permohonan semakan kehakiman untuk membatalkan keputusan KP. Dalam membenarkan permohonan itu, Mahkamah Tinggi memutuskan bahawa: (a) peraturan 46 Peraturan GST adalah peruntukan bebas yang tidak terjejas oleh ss 38 dan 39 Akta GST; (b) memandangkan peraturan 46 tidak menyebut tentang 'bekalan bercukai', ia adalah salah bagi KP untuk mengenakannya sebagai keperluan apabila memutuskan tuntutan ITC Exceptional; (c) pemansuhan Akta GST dengan sendirinya tidak menyebabkan tuntutan responden tidak berkesan; dan (d) keputusan KP untuk membenarkan sebahagian kecil daripada tuntutan ITC Exceptional dan menolak baki yang lebih besar adalah tidak konsisten dan tidak munasabah melebihi tahap ketidakwajaran *Wednesbury*.

Diputuskan, sebulat suara membenarkan rayuan dan mengetepikan keputusan Mahkamah Tinggi:

(1) Hakim Mahkamah Tinggi ('HMT') terkhilaf dari segi undang-undang dalam tafsiran beliau tentang peruntukan Akta GST dan Peraturan GST yang mewajibkan campur tangan rayuan (lihat perenggan 44).

(2) Tuntutan untuk cukai input di bawah peraturan 46(1) Peraturan-Peraturan GST adalah luar biasa kerana GST yang ditanggung oleh seseorang ke atas pembekalan barangan kepadanya sebelum pendaftarannya sebagai 'orang kena cukai' bukanlah cukai input dan tidak boleh dituntut melainkan dan sehingga KP menggunakan budi bicaranya di bawah peraturan 46(1) untuk memberi kuasa kepada orang itu untuk menganggap cukai yang dibayar sebagai cukai input. Tiada apa-apa dalam peraturan 46(1) membenarkan responden menuntut exceptional ITC sebagai hak (lihat perenggan 27–30).

(3) HMT secara terang-terangan tersilap apabila beliau berpendapat bahawa adalah memadai jika responden telah mematuhi semua peruntukan dalam peraturan 46 Peraturan GST dan peraturan 46 tidak tertakluk kepada ss 38 dan 39 Akta GST (lihat perenggan 31–32).

(4) Responden adalah 'orang kena cukai' di bawah Akta GST hanya dari 1 Ogos 2016 sehingga 31 Ogos 2018 di mana tarikh akhir Akta GST berakhir. Loji janakuasa responden hanya mula beroperasi pada 10 Disember 2018 apabila ia mula membekalkan elektrik ke Grid Nasional. GST yang ditanggung oleh responden ke atas kos pembinaan loji janakuasa tidak boleh dianggap sebagai cukai input dan tidak boleh dikreditkan kerana tiada kaitan langsung dengan mana-mana pembekalan bercukai yang dibuat atau akan dibuat daripada loji sepanjang tempoh perkhidmatan responden sebagai orang kena cukai di bawah perundangan GST. Di bawah s 39 Akta GST, tuntutan cukai input mesti disambungkan kepada pembekalan bercukai. Apabila Akta GST dimansuhkan, sebarang permohonan yang dibuat oleh responden selepas 1 September 2018 tidak lagi boleh dianggap sebagai pembekalan bercukai tetapi hanya sebagai pembekalan biasa. Di premis itu, KP tidak diberi kuasa di bawah Akta GST untuk membenarkan responden mengambil kira jumlah RM45,873,669.66 sebagai cukai input di bawah peraturan 46(1) kerana jumlah itu tidak dikaitkan dengan mana-mana pembekalan bercukai yang dibuat oleh responden dan oleh itu tidak boleh dianggap sebagai cukai input (lihat perenggan 35–41).

(5) Berkenaan dengan GST yang ditanggung ke atas perabot dan kelengkapan, mahkamah bersetuju dengan KP bahawa perkara yang sama boleh dianggap sebagai cukai input secara sebahagiannya kerana responden telah menggunakan barangan ini untuk membuat pembekalan bercukai lain dari Ogos 2016 hingga Ogos 2018 Oleh itu, tuntutan responden untuk jumlah RM2,231.20 untuk cukai input ke atas perabot dan kelengkapan dibenarkan (lihat perenggan 43).]

Cases referred to

Associated Provincial Picture Houses Ltd v Wednesbury Corp [1948] 1 KB 223, CA (refd)

Schemepanel Trading Ltd v Customs and Excise Commissioners [1996] STC 871, QBD (refd)

Seratim Sdn Bhd v The Customs Appeal Tribunal & Anor [2020] 9 MLJ 1, HC (refd)

Legislation referred to

Goods and Services Tax Act 2014 (repealed by the Goods and Services Tax (Repeal) Act 2018) ss 2, 38, 38(1), 39, 39(1), First Schedule, para 4

Goods and Services Tax Regulations 2014 regs 39, 46, 46(1), (2), (3), (4), (5)

Appeal from: *Jimah East Power Sdn Bhd v Ketua Pengarah Kastam, Jabatan Kastam Diraja Malaysia* [2021] MLJU 2764 (High Court, Kuala Lumpur)

Mohd Izhanudin Alias (with Iznie Elynna Zainal and Liew Horng Bin) (Attorney General's Chambers) for the appellant.

S Saravana Kumar (with Amira Ahmad Azhar) (Rosli Dahlan Saravana Partnership) for the respondent.

Azizah Nawawi JCA:

INTRODUCTION

[1] This is an appeal against the decision of the learned High Court judge dated 28 September 2020.

[2] The learned High Court judge had allowed the respondent's judicial review application to quash the Director General of Customs ('DG') decision to only allow a nominal portion of the respondent's claim for exceptional input tax ('exceptional ITC claim') under reg 46(1) of the Goods and Services Tax Regulations 2014 ('the GST Regulations') for the sum of RM2,231.21 instead of the full sum of RM45,873,669.66.

THE BRIEF FACTS

[3] The principal activities of the respondent are to design, construct, commission, operate and maintain a 2,000MW coal fired power plant in Mukim Jimah, Port Dickson, Negeri Sembilan ('power plant'). The power plant was to commence commercial operation in year 2019.

A **[4]** The respondent had entered into a power purchase agreement dated 22 July 2014 ('PPA') to sell electricity to Tenaga Nasional Bhd ('TNB') for a period of 25 years.

B **[5]** The respondent made an application to the DG for it to be registered under Goods and Services Tax Act 2014 ('the GST Act'). The application was approved with the effective date of 1 March 2018.

[6] However, the approval was cancelled on 16 June 2015. The respondent C applied again and it was approved on 20 September 2016.

[7] The respondent made an exceptional ITC claim to the DG under reg 46(1) of the GST Regulations for the sum of RM45,873,669.66.

D **[8]** The DG informed the respondent that as the respondent has not started to make any taxable supply, the DG would postpone his final decision on whether to allow the exceptional ITC claim until after the respondent had started to make a taxable supply from its business activities.

E **[9]** The respondent then applied to vary the duration of its taxable period. The DG had allowed the respondent's application and changed its first taxable period to commence from 1 August 2016 to 31 August 2018. Following from this, the respondent was required to file its first GST by 29 December 2018. The respondent had filed its first GST return and claimed for input tax credits F in the sum of RM360,247,062.65, which consists of the following:

(i) the exceptional ITC claim of RM45,873,669.66; and

(ii) input tax credits paid for the transactions which took place in the G respondent's first taxable period in the sum of RM314,373,392.98.

[10] The DG made his decision ('the decision') on 25 March 2019 and informed the respondent that only RM2,232.21 is allowed as the respondent's exceptional ITC claim in respect of item (i) above. There is no issue with H regards to item (ii).

[11] Aggrieved by the DG's decision, the respondent applied to quash the decision of the DG and sought a declaration that the respondent is entitled to claim exceptional ITC claim for sum of RM45,873,669.66 pursuant to I reg 46(1) of the GST Regulations;

[12] The learned High Court judge had allowed the respondent's judicial review application to quash the DG's decision and grant the declaratory prayers sought by the respondent. Hence this appeal was filed by the DG of Customs.

DECISION OF THE HIGH COURT

[13] The core issue identified by the High Court is whether the DG was right in law in rejecting the full amount claimed of RM45,873,669.66.

[14] In allowing the judicial review application, the learned High Court judge, inter alia, held that:

(a) ss 38 and 39 of the GST Act are only applicable to general input tax claim for GST incurred during the taxable period and not towards the exceptional ITC claim (para [21] GOJ);

(b) exceptional ITC claim is governed by reg 46 of the GST Regulations which is a separate and independent provision. In the absence of any express reference in the aforesaid provision, an exceptional ITC claim under reg 46 of the GST Regulations should not be subject to the requirements set out in ss 38 and 39 of the GST Act (para [21] GOJ);

(c) to satisfy reg 46, there is no specific or other requirements needed, except what has been stated in reg 46(2) to reg 46(5). The DG's decision to impose an additional requirement of a taxable supply is without any legal basis. In such circumstances, the DG had wrongly exercised his discretion in respect of the respondent's exceptional ITC claim (para [22–23] GOJ);

(d) under the GST Act, the Government's revenue is in the form of output tax charged by the taxable persons (in this case is the respondent) to their customers or clients. The input tax must, upon application and compliance with the provisions set out in the GST Act and GST Regulations, be refunded to the taxable persons (para [24] GOJ);

(e) if the GST Act was not repealed, the respondent would have been entitled to claim for the disallowed ITC as the power plant had been commissioned and started producing electricity, which is regarded as a taxable supply under para 4 of the First Schedule of the GST Act. There is no significant provision in the GST Act (repealed GST Act) which states that the respondent could not claim after the GST Act has been repealed (para [27] GOJ);

(f) since the respondent has submitted all relevant supporting documents via a letter dated 8 January 2019, therefore there is a legitimate expectation that the exceptional ITC claim would be allowed in its entirety. Unfortunately, only a nominal sum was allowed which is not in accordance with reg 46. This is beyond the respondent's legitimate expectation (para [28–29] GOJ); and

(g) since there is no formula prescribed in reg 46(1) of the GST Regulations in considering the respondent's exceptional ITC claim, the DG's

A decision to allow the input tax for the furniture and equipment purchased is inconsistent with the exceptional input tax incurred for the construction of the power plant itself. The inconsistency shows that the decision is unreasonable to the extent of *Wednesbury* unreasonableness and therefore ought to be quashed by the court (para [30] GOJ).

B

APPELLANT'S GROUNDS OF APPEAL

[15] For the purpose of this appeal, the appellant DG submits as follows:

C (a) reg 46 which provides for 'exceptional claim for input tax' must be read together with and subject to ss 2, 38 and 39 of the GST Act and reg 39 of the GST Regulations; and

(b) the formula devised and relied upon by the appellant embodies the basic principles and criteria regulating input tax claim as spelt out in ss 2, 38 and 39 of the GST Act and reg 39 of the GST Regulations;

D

OUR DECISION

E **[16]** In para 6 of the DG's affidavit affirmed on 19 November 2019, the DG has explained that GST is a tax system based on value-added or margin. To achieve the concept of value-added taxation, output tax is imposed on the total value of supply, while input tax incurred on acquisitions is allowed to be reclaimed as input tax credit. The difference between output tax and input tax is the tax value within the concept of value-added or margin taxation. Based on this concept, the tax incurred on business acquisitions can be reclaimed as input tax. Therefore, this input tax does not become a cost to the business.

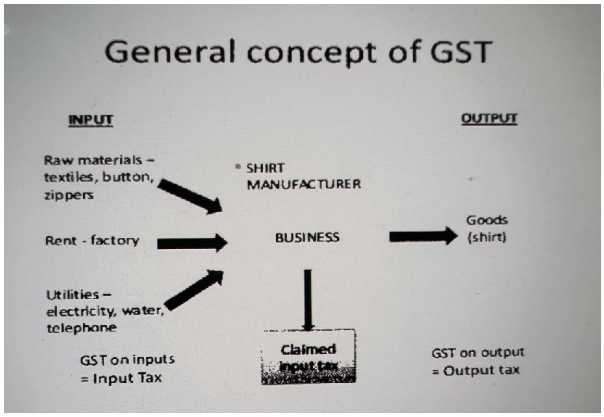
F

[17] The DG added that through the GST taxation system, end users will bear the tax charged and cannot claim it back. End users include individuals and businesses that are not registered for GST. The government will collect revenue through these end users. Businesses eligible to recover input taxes and able to impose output tax are referred to as taxable persons.

G

H **[18]** In para (7) of his affidavit, the DG gave the following illustration:

I



[19] In other words, under the GST regime, business making taxable supplies have to be registered under GST (taxable person) if their annual sales turnover has exceeded the prescribed threshold (RM500,000). Only a registered person can charge and collect GST on the taxable supplies of goods and services made by him. GST is charged on the value or selling price of the products. The amount of GST incurred on input (input tax) can be deducted from the amount of GST charged (output tax) by the registered person. If the amount of output tax is more than the input tax in the relevant taxable period, the difference shall be remitted to the Government. However, if the input tax is more than the output tax, the difference will be refunded by the Government.

[20] The relevant terms, input tax, output tax and taxable person are statutorily defined in s 2 of the GST Act:

> 'Input tax' means —
>
> (a) tax on any supply of goods or services to a taxable person; and
>
> (b) tax paid or to be paid by a taxable person on any importation of goods, and the goods or services are used or are to be used for the purposes of any business carried on or to be carried on by the taxable person:
>
> Provided that where the goods or services are used or are to be used partly for the purposes of any business carried on or to be carried on by the taxable person and partly for other purposes, tax on the supply and importation shall be apportioned so that only so much as is attributable to the purposes of his business is counted as his input tax;
>
> 'output tax' means tax on any taxable supply of goods or services made by a taxable person in the course or furtherance of his business in Malaysia;
>
> 'taxable person' means any person who is or is liable to be registered under this Act;

[21] In the GST regime, the basic rule is that a '*taxable person*' *is only entitled*

to claim input tax credit to be deducted from any output tax due from him after registration under the Act, that is, '*at a time when he is a taxable person*'. This is provided in s 38(1) of the GST Act:

> 38 Credit for input tax against output tax
>
> (1) Any taxable person is entitled to credit for so much of his input tax as is allowable under section 39 to be deducted from any output tax that is due from him.

[22] Section 39 of the GST Act provides that:

> Amount of input tax allowable
>
> (1) The *amount of input tax for which any taxable person is entitled to credit* in any taxable period shall be so much of the input tax for the period *that is allowable and reasonable to be attributable*, as may be prescribed, to the *following supplies* made or to be made by the taxable person in the course or furtherance of any business in Malaysia:
>
> (a) any taxable supply, including a taxable supply which is disregarded under this Act;
>
> (b) any supply made outside Malaysia which would be a taxable supply if made in Malaysia; or
>
> (c) any other supply as may be prescribed. (Emphasis added.)

[23] Regulations 39 of the GST Regulations 2014 provides that:

> Attribution of input tax to taxable supplies
>
> (1) Subject to regulation 43, the amount of input tax which a taxable person shall be entitled to deduct provisionally shall be that amount which is attributable to taxable supplies in accordance with this regulation.

[24] Therefore, from the reading of ss 2, 38 and 39 of the GST Act as well as reg 39 of the GST Regulations, we can summarise as follows:

(a) the amount of input tax claimable must be 'allowable and reasonable' (s 39(1) of the GST Act);

(b) it must be 'attributable to taxable supplies' (s 39(1) of the GST Act and reg 39 of the GST Regulations);

(c) the attribution must be 'used or are to be used' for a 'taxable supply' (see definition of 'input tax' in s 2 of the GST Act); and

(d) the 'taxable supply' was made by the taxable person in the course or furtherance of any business in Malaysia' (s 39(1) of the GST Act).

[25] However, with regards to input tax incurred before the date with effect from which a person becomes a 'taxable person', that is, the date with effect he became liable to be registered or from which he was registered, the registrant

can make a claim under reg 46 of the GST Regulations 2014 for an exceptional claim of input tax credit.

[26] In other words, a registered taxable person may apply to claim the input tax incurred on supplies made to them before their registration under the GST Act. This exception is provided in reg 46(1) of the GST Regulations 2014. *Once registered for GST, the taxable person can claim the input tax incurred on pre-registration supplies that were intended for use in subsequent taxable supplies after registration*. These claimed GST amounts are considered as 'exceptional input tax', which is allowable under reg 46 of the GST Regulations, which reads as follows:

> 46 Exceptional claims for input tax
>
> (1) Subject to subregulation (2), the *Director General may authorise a taxable person to treat as if it were input tax, any tax paid on the supply of goods to the taxable person before the date with effect from which he was, or was required to be registered, or paid by him on imported goods before that date, for the purpose of a business which was carried on or was to be carried on by him at the time of such supply or payment*.
>
> (2) No tax may be treated as if it were input tax in respect of —
>
> (a) goods which had been supplied or consumed;
>
> (b) goods which have been used partially or incorporated into some other goods; or
>
> (c) goods held for other than business use, by the person referred to in sub-regulation (1) before the date with effect from which such person was, or was required to be, registered.
>
> (3) A claim under sub-regulation (1) shall, except as the Director General may otherwise allow, be made on the first return the taxable person furnishes pursuant to section 41 of the Act and, as the officer of goods and services tax may require, be supported by tax invoices and other evidence.
>
> (4) A taxable person making a claim under sub-regulation (1) shall keep and preserve for seven years from the latest date to which the records relate in respect of goods, a stock account showing separately quantities purchased, quantities used in the making of other goods, date of purchase and date and manner of subsequent disposals of such quantities.
>
> (5) Any person who has been but is no longer a taxable person may make a claim to the Director General for the payment of any amount of any tax on the supply of services to him after the date with effect from which he ceased to be or to be required to be registered and which was attributable to any taxable supply made by him in the course or furtherance of any business carried on by him when he was or was required to be registered. (Emphasis added.)

[27] The *claim for input tax under reg 46(1) of the GST Regulations is an exceptional claim because the GST incurred by a person on the supply of goods to him prior to his GST registration is not an input tax and is not claimable, unless*

and until the DG exercised his discretion under reg 46(1) of the GST Regulations to authorize that person to treat the GST incurred prior to his GST registration as an input tax.

[28] As such, a GST registered person cannot claim the GST incurred on supply of goods or services to him prior to his GST registration as the said GST is not an input tax. The said GST can only be claimed if the DG exercised the discretion to authorize the person to treat the said GST as an input tax under reg 46(1) of the GST Regulations.

[29] We are therefore of the considered opinion that there is nothing in reg 46(1) that allows the respondent to claim, as of right, for the whole exceptional input tax that was allowed by the learned High Court judge.

[30] Regulation 46 merely empowers the DG to allow the respondent to claim for the input tax that they have paid before they are registered under the GST Act as a taxable person.

[31] We are of the considered opinion therefore that the learned judge was plainly wrong in her finding that the exceptional ITC claim is governed solely by reg 46 of the GST Regulations and that the said provision is a separate and independent provision from ss 2, 38 and 39 of the GST Act.

[32] The learned judge was also plainly wrong when she held that in the absence of any express reference in the other provisions, an exceptional ITC claim under reg 46 of the GST Regulations should not be subject to the requirements set out in ss 38 and 39 of the GST Act. In para [22] of the judgment, the learned judge held as follows:

> [22] To satisfy reg 46, there is no specific or other requirements needed, except what has been stated under reg 46(2) until 46(5). After perusing the facts of the case, this court finds that the applicant has complied with all the elements to an exceptional ITC claim under reg 46(1) of the GST Regulations.

[33] Regulation 46 merely empowers the DG to allow the respondent to claim for the input tax that they have paid before they are registered under the GST Act as a taxable person.

[34] Therefore, under the GST regime, the respondent's exceptional input tax can be deducted from the amount of GST charged (output tax), once they became a taxable person.

[35] However, in the present case, the respondent's application for a refund of the exceptional input tax was rejected by the DG. In para 8 of his affidavit,

the DG explained the reason for the rejection:

> ... *Jelas bahawa GST yang ditanggung Pemohon sebahagian besarnya tidak berkaitan dengan pembekalan bercukai dan hanya sebahagian kecil sahaja yang dapat di hubungkait dengan pembekalan bercukai yang dilakukan*. Section 38 dan section 39 Akta 762 jelas menyatakan cukai input hanya layak untuk dikreditkan kepada orang kena cukai dan munasabah untuk berhubungkait dengan pembekalan bercukai yang dilakukan atau tidak dilakukan. *Di dalam kes ini Pemohon merupakan pengguna akhir di dalam rantaian pembekalan tersebut apabila GST dimansuhkan. Menurut section 39 Akta 762 cukai input mesti mempunyai hubungkait dengan pembekalan bercukai. Maka apabila GST telah dimansuhkan apa-apa pembekalan oleh Pemohon selepas 01.09.2018 sudah tidak dinamakan sebagai pembekalan bercukai lagi dan hanya menjadi pembekalan biasa sahaja*. (Emphasis added.)

[36] From the above paragraph, the DG had explained that the majority of the GST borne by the respondent is not related to taxable supplies, and only a small portion can be associated with the taxable supplies made. This is because ss 38 and 39 of the GST Act clearly provides that *input tax is eligible for credit by the tax payer should reasonably relate to the taxable supplies made or to be made*.

[37] In this case, the DG had explained that the respondent is an end consumer in the supply chain when the GST was abolished. *According to s 39 of the GST Act, input tax must be connected to taxable supplies. Therefore, when the GST was abolished, any supplies made by the respondent after 1 September 2018 are no longer considered taxable supplies, but are merely regular supplies*.

[38] We are therefore of the considered opinion that the GST borne by the respondent on the construction costs of the power plant cannot be considered as input tax and cannot be credited as there is no direct connection to any taxable supply made or to be made from this plant throughout the respondent's tenure as a taxpayer under the GST legislation. Support can be found from the case of *Schemepanel Trading Ltd v Customs and Excise Commissioners* [1996] STC 871 which held that:

> *Input tax could be deducted only to the extent that the goods or services on which it has been paid were 'cost components' of a taxable transaction*. A taxable transaction was a transaction that was subject to tax. In the instant case, *the inputs related to outputs that are not subject to tax and they were not therefore 'cost components' of a taxable person*. (Emphasis added.)

[39] This was explained by the DG in para 11 of his affidavit:

> (11) ... Disebabkan responden menjadi orang kena cukai hanya selama 761 hari sahaja iaitu dari 1 Ogos 2016 sehingga 31 Ogos 2018 dan *tidak melakukan bekalan bercukai dari loji Janakuasa yang masih dalam pembinaan, adalah tidak adil dan wajar kelulusan cukai input pada amaun penuh diberikan. Oleh yang demikian pembahagian cukai input dilakukan bagi mendapatkan amaun cukai input yang layak*

untuk dikreditkan. GST yang ditanggung ke atas pembinaan loji janakuasa tidak adil dan tidak wajar dikreditkan kepada pemohon kerana tiada pembekalan bercukai dilakukan dari loji. (Emphasis added.)

[40] In para 10 of the respondent's affidavit to support the judicial review application, the respondent had affirmed as follows:

10. Operasi awal unit satu telah bermula pada 10 Disember 2018 apabila elektrik dijanakan dan dibekalkan kepada grid nasional. Tarikh operasi awal bagi unit dua telah bermula pada 11 hari Jun 2019.

[41] The respondent's first taxable period was between 1 August 2016 to 31 August 2018. However, the operations of the power plant in generating electricity supply only started on 10 December 2018, after the abolishment of the GST. Therefore, the DG is not statutorily authorised to allow the respondent to treat as input tax the GST amount of RM45,873,669.66 under reg 46(1) of the GST Regulations because the amount incurred by the respondent is not attributable to the taxable supply made by the respondent and therefore cannot be treated as an input tax.

[42] In the case of *Seratim Sdn Bhd v The Customs Appeal Tribunal & Anor* [2020] 9 MLJ 1, it was held as follows:

[8] *In the context of the present appeal before this court, it should be clear that any taxable person is entitled to credit or to submit an application for an ITR, in any taxable period, the input tax for the period that is allowable and reasonable to be attributable to the following supplies made in the course of businesses, as laid down in s 39(1)(b) of the Goods and Services Tax Act 2014*:

(b) *any supply made outside Malaysia which would be a taxable supply if made in Malaysia* ... (Emphasis added.)

[9] In short, for the *appellant to succeed in its claim for an ITR for the taxable period of 31 August 2016, the appellant would need to prove the value of input tax declared must be attributable to the exportation of sawn timbers to its overseas customers*.

[20] ...

[29] As such, I agree with the second respondent's argument that when *there is no submission of a properly filled out K2 Form to indicate the exact details of the sawn timbers that were 'exported' during the taxable period of 31 August 2016 by the appellant, there is no proof that there was an export of sawn timbers as claimed by the appellant and since there was also no apparent attribution between the input tax and supply made by the appellant due to the discrepancies of the documents submitted that fulfils the requirement set under s 39(1) of the Goods and Services Tax 2014, hence, the application for ITR is erroneous*.

[30] There was no exportation of goods by the appellant under the governing provisions of the Customs Act 1967 and the Goods and Services Tax Act 2014 and

that the first respondent had arrived at his decision correctly in rejecting the appellant's application for ITR for the taxable period of 31 August 2016. (Emphasis added.)

[43] With regards to the GST borne on furniture and fittings, we agree with the DG that the same can only be considered as an input tax in part because the respondent had used these items to make other taxable supplies from August 2016 to August 2018. Therefore, the respondent's claim for the sum RM2,231.20 for the input tax on furniture and fittings is allowed.

CONCLUSION

[44] Based on the foregoing, we are of the considered opinion that the learned judge has erred in law in her interpretation of the said provisions in the GST Act and the GST Regulations and this warrants our appellate intervention. The appeal is therefore allowed and the decision of the learned judge is set aside.

Appeal allowed and High Court's decision set aside.

Reported by Ashok Kumar